No. 14412

In the United States Court of Appeals for the Ninth Circuit

A B C Brewing Corporation (formerly Aztec Brewing Company), a corporation, petitioner

v.

Commissioner of Internal Revenue, respondent

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

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OPINION BELOW

The findings of fact and opinion of the Tax Court (R. 70-77) are reported in 20 T. C. 515.

JURISDICTION

Taxpayer's petition for review (R. 105-113) involves deficiencies in federal excess profits taxes for the fiscal years ended October 31, 1943, and October 31, 1944, resulting from the denial of its claims for a carry back of alleged unused excess profits credit from the years ended October 31, 1945, and October 31, 1946, respectively. Taxpayer filed corporation income tax and excess profits tax returns for the fiscal years 1943, 1944,

1945, and 1946 with the Collector of Internal Revenue for the Sixth District of California. (R. 9, 30.) On September 18, 1944, and April 26, 1946, the Commissioner of Internal Revenue mailed notices of deficiencies to the taxpayer advising it of a deficiency in excess profits taxes of $232,437.25 for the fiscal year 1943, and of $41,557.63 for the fiscal year 1944.[1] (R. 16-21, 35-43.) Within 90 days thereafter, on December 11, 1944, and July 17, 1946, taxpayer filed petitions for redetermination of the deficiencies under Section 275 of the Internal Revenue Code. (R. 9-21, 30-43.) On March 16, 1954, the Tax Court entered its decisions finding deficiencies in excess profits taxes for the fiscal years 1943 and 1944 in the amounts of $217,423.07 and $36,738.21, respectively.[2] (R. 77-78.) The case is brought to this Court by a petition for review filed by the taxpayer on June 14, 1954. (R. 105-113.) The jurisdiction of this Court is invoked under the provisions of Section 7482 of the Internal Revenue Code of 1954.

QUESTION PRESENTED [3]

Where all the stockholders consented to the dissolution of the taxpayer corporation on March 31, 1944, and on April 1, 1944, there was a partial liquidation through the distribution of all of taxpayer's assets except small amounts of cash and United States Treasury obligations, and, although taxpayer has not actively engaged in the brewery business since that date, its entire

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[1] A portion of the deficiencies for both taxable years as determined by the Commissioner and by the Tax Court results from issues other than that involved in this appeal.

[2] See footnote 1, *supra*.

[3] In the Tax Court, other issues were presented as to which neither the taxpayer nor the Commissioner has appealed.

activity being incident to winding up its affairs, no certificate of dissolution has ever been filed with the California Secretary of State, did the Tax Court err in finding that taxpayer was *de facto* dissolved as of November 1, 1944, and consequently is not entitled to a carry back of alleged unused excess profits credit from the fiscal years 1945 or 1946?

STATUTES AND REGULATIONS INVOLVED

The applicable statutes and Treasury Regulations are set forth in the Appendix, *infra*.

STATEMENT

The pertinent facts as stipulated by the parties (R. 46-48), as found by the Tax Court (R. 70-77), and as reflected in the testimony, pleadings, and exhibits may be summarized as follows:

Taxpayer was organized under the laws of the State of California in 1932, as the Aztec Brewing Company. Its principal place of business was in San Diego, California, where it operated a brewery from June, 1933, to March 31, 1944. It has not actively engaged in the brewery business since March 31, 1944. On March 7, 1944, all of taxpayer's stockholders executed a written consent stating their election to wind up and dissolve the corporation. On April 1, 1944, taxpayer distributed[4] assets of the corporaiton in partial liquidation, worth $750,000 in book value. (R. 48, 71-72.)

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[4] The president of the taxpayer corporation testified that this distribution was to a partnership. (R. 79.) There is nothing further in the record as to this partnership. However, the relationship of the taxpayer corporation to the partnership was described by

During the fiscal years 1945 and 1946, taxpayer's stockholders set aside a good part of the basement for the corporation's voluminous records. (R. 88.) There was a bank account in taxpayer's name during these years, and its president and auditor performed various services on its behalf, such as the preparation and filing of federal and state returns, petitions to the Tax Court, applications for relief under Section 722 of the Code, and taking care of other matters relating to the winding up of taxpayer's affairs. Taxpayer's officers received no compensation and no salaries or wages were paid in these fiscal years. Small collections were made on accounts previously charged off by the taxpayer, and minor expenses were incurred. (R. 73, Exs. M and N.)

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the California Supreme Court in *Gordon* v. *Aztec Brewing Co.*, 33 Cal. 2d 514, 203 P. 2d 522, as follows (p. 521):

> There is no conflict in the evidence on this question. The Aztec Brewing Company, a corporation, was organized in 1932 and thereafter engaged in the manufacture and sale of ABC beer. In March, 1944, the company's structure was changed to a partnership for tax reasons. All of the corporation's property was transferred to the partnership and the business continued as before, the partnership assuming without interruption the manufacturing, bottling and selling of ABC beer. The partners were the same persons as the stockholders in the corporation. They acquired and retained the same proportional interest in the partnership as they had had in the corporate stock. The president and vice-president of the corporation became general partners in the new partnership while the other former stockholders became limited partners. The name, Aztec Brewing Company, was retained and a license procured to sell beer under that name. The partnership continued to employ the same personnel and use the same manufacturing plant and offices. No changes were made in labels, packing cases, letterheads or invoices. The corporation was not dissolved, however, but remained in existence to collect debts owed it, continuing for a short time to use the offices of its successor. Checks of the corporation and partnership were differentiated by the addition of the words "corporation" or "a partnership" after the name, Aztec Brewing Company.

Taxpayer's balance sheet as of March 31, 1944, showed the following assets and liabilities (R. 64-65):

March 31, 1944			
Assets			
Current assets			
Cash on hand		$ 11,476.72	
Bank of America		554,791.02	$ 566,267.74
Accounts Receivable—Customers			171,136.19
Inventories at cost (finished stock and containers, beer in storage, raw materials, supplies)			363,411.05
Total Current Assets			1,100,814.98
Property plant and equipment			
Plant and equipment		927,876.15	
Less Reserve for depreciation		541,415.73	386,460.42
Land			8,501.29
Other assets			7,794.34
Deferred expenses (taxes, insurance, general expense)			33,733.86
Intangible assets			
Organization expense		622.95	
Trade marks		2,353.83	3,016.78
Total Assets			1,540,321.67
Liabilities			
Current liabilities			
Notes payable to vendors		18,937.14	
Accounts payable		29,730.50	48,667.64
Accrued liabilities			
Salaries and wages		7,617.43	
Social security and unemploy. taxes		14,108.41	
Other taxes		357,453.77	379,179.61
Total Current Liabilities			427,847.25
Other liabilities			
Credit balances in former customers' accounts		240.85	
Unrealized profit on excess profits tax bonds (per Contra)		1,696.32	1,937.17
Capital stock		100,000.00	
Surplus	$584,591.42		
Current year profits	425,945.83	1,010,537.25	
Total Capital			1,110,537.25
Total Liabilities			$1,540,321.67

Taxpayer's balance sheets at the end of the fiscal years 1944, 1945 and 1946 reflect the following assets and liabilities (R. 66):

Assets	October 31 1944	1945	1946
Cash	$107,158.61	$ 1,498.11	$ 15,299.58
U. S. Treasury Obligations	143,172.23	13,172.23	10,000.00
Total Assets	$250,330.84	$ 14,670.34	$ 25,299.58
Liabilities			
Accrued taxes	$ 13,050.36	.....	$ 72.13
Accrued Expenses	.....	$ 25.35	21.25
Unrealized Profit on Excess Profits Tax Bonds	3,172.23	3,172.23	.....
Capital Stock	$100,000.00	$100,000.00	$100,000.00
Earned Surplus	884,108.25	661,472.76	675,206.20
Sub-total	$984,108.25	$761,472.76	$775,206.20
Less: Liquidation Account	750,000.00	750,000.00	750,000.00
Net Worth	$234,108.25	$ 11,472.76	$ 25,206.20
Total Liabilities	$250,330.84	$ 14,670.34	$ 25,299.58

The increase in net worth over the period October 31, 1945, to October 31, 1946, of $13,733.44, as shown above, was derived as follows (R. 72):

Recoveries on bad debts	$ 150.00
Refund of California franchise tax	204.12
Postwar refunds of excess profits tax	13,472.70
Total additions	$13,826.82
California franchise tax	$ 21.25
Federal income tax	72.13
Total reductions	$ 93.38
Net increase	$13,733.44

Taxpayer's returns for the fiscal years 1944, 1945 and 1946 showed the following items of gross income and deductions (R. 73, Ex. L):

	Fiscal Year Ended October 31		
	1944	1945	1946
Gross profit from sales	$599,072.96	0	0
Interest on loans, notes, mortgages, bonds, bank deposits, etc.	339.64	0	0
Interest on U. S. Obligations	960.00	$ 582.00	0
Recoveries on bad debts	25,073.07	256.00	$ 150.00
Other income (refunds, discounts, & misc.)	5,783.33	0	0
Refund of California franchise tax	0	0	204.12
Gain from sale or exchange of capital assets	81.30	0	0
Total income	$631,310.30	$ 838.00	$ 354.12
Deductions:			
Capital stock tax	$	$ 62.50	$ 0
California franchise tax		12,621.34	21.25
Collection fee on debt recoveries		30.00	
Total deductions	$329,306.66	$12,713.84	$ 21.25
Net income (or loss)	$302,003.64	($11,874.84)	$ 332.87

Taxpayer's auditor received a letter from its attorney dated January 4, 1946, reading in part as follows (R. 74):

> It is also believed advisable to file a corporation excess profits tax return for the year ended October 31, 1945, even though no tax is due for that year in order to show a basis for claiming the benefits of an unused excess profits credit carryback. That return has been prepared and is enclosed herewith in triplicate.

No certificate of dissolution has yet been filed on taxpayer's behalf with the Secretary of State pursuant to Section 5200, California Corporation Code.

On September 21, 1946, taxpayer's name was changed to the A B C Brewing Corporation. (R. 72.)

The Tax Court found that on the facts taxpayer had been *de facto* dissolved at the beginning of the fiscal

year 1945, and consequently it held that taxpayer was not entitled to a carry back of alleged unused excess profits credit from that year to the fiscal year 1943 or from the fiscal year 1946 to 1944. (R. 74-77.) From that holding the taxpayer has appealed to this Court. (R. 77-78, 105-112.)

SUMMARY OF ARGUMENT

The Tax Court did not err in disallowing the taxpayer's claim for a carry back of alleged unused excess profits credit from the fiscal year 1945 to the year 1943, and from the fiscal year 1946 to the year 1944. Section 710(c) of the Internal Revenue Code is a special relief provision that was designed to correct hardship cases by leveling the burden of excess profits taxes over a five-year period of operations. Congress had no intention to grant carry backs in situations unrelated to the purpose and intent of the statute.

While a corporation that has begun to liquidate is not excluded from the carry back provisions of the statute, a corporation that is in existence in name only, without corporate substance, and which serves no business purpose, must be treated as *de facto* dissolved and a carry back necessarily denied.

The record fully supports the Tax Court's finding that the taxpayer ceased all normal business activity on April 1, 1944. Thereafter it made no sales, had no inventory, owned no land, plant or equipment. It paid no salaries or wages and its assets were all distributed to the stockholders except for small amounts of cash and United States Treasury obligations. Excess profits tax returns were filed only as a basis for hypothetical excess profits credit carry backs.

There is no merit to taxpayer's argument that it nec-

essarily continued as a corporation to resolve tax disputes with the Internal Revenue Service and to file tax returns and prepare claims under Section 722 of the Code. All these activities could have been completed after formal dissolution. Under California law, a dissolved corporation continues in existence for the purpose of winding up and its directors have full authority to defend or prosecute actions. The Tax Court was more than fair in allowing a carry back for a seven months' period after the date on which the taxpayer ceased to operate as a brewery. The taxpayer has shown no valid reason for prolonging the existence of the corporation and no reason for it except tax avoidance. To permit a taxpayer to continue to carry back a large excess profits credit simply by retaining its charter and doing nothing is contrary to the purpose of Congress in enacting the carry back provisions.

The taxpayer has failed to carry the burden of showing its right to the claimed deduction. In the absence of a showing that the Tax Court was clearly erroneous in its finding that the taxpayer had *de facto* dissolved, on which its denial of a carry back depends, its decision should be affirmed.

ARGUMENT

A Corporation Which Has Been *De Facto* Dissolved Is Not Entitled to Carry Back Excess Profits Credit Simply by Retaining Its Corporate Form While Engaging in No Activity

A. *In General.*

The excess profits tax statutes, which were applicable through 1945 but repealed for subsequent years,[5] im-

[5] However, by Section 122(b) of the Revenue Act of 1945, c. 453, 59 stat. 556 (Appendix, *infra*), a carry back, if otherwise allowable, is permitted from a taxable year beginning before January 1, 1946.

pose a tax of 95 percent on what is termed the "adjusted excess profits net income." Section 710(a) and (b) of the 1939 Internal Revenue Code (Appendix, *infra*). To determine the amount of "adjusted excess profits net income", the "excess profits net income" is determined by making certain adjustments to normal tax net income and from the resulting figure is deducted (1) a specific exemption; (2) an excess profits credit (designed to exclude what are normal, as distinguished from excess, profits of the taxable year); and (3) the amount of the excess profits credit adjustment for the taxable year, consisting of carry overs and carry backs of unused excess profits credits for certain prior and subsequent years. Sections 710(b) and (c) (Appendix, *infra*), and 711(a), as added by Section 201 of the Second Revenue Act of 1940, c. 757, 54 Stat. 974. We are not here directly concerned either with taxpayer's specific exemption or its excess profits credit for the taxable years. The sole question in this case deals with the taxpayer's right to the third deduction, that is, whether the Tax Court erred in disallowing the taxpayer's claim for a carry back of alleged unused excess profits credits from the fiscal year 1945 to the year 1943, and from the fiscal year 1946 to the year 1944.

Section 710(b)(3) requires that the amount of the unused excess profits credit adjustment for the taxable year be computed "in accordance with subsection (c)." Under subparagraph (1) of subsection (c) the unused excess profits credit adjustment for any taxable year consists of the aggregate of unused excess profits credit carry overs and carry backs to such taxable year.

The carry backs are authorized by subparagraph (3) (A) in the following language:

> If for any taxable year beginning after December 31, 1941, the taxpayer has an unused excess profits credit, such unused excess profits credit shall be an unused excess profits credit carry-back for each of the two preceding taxable years, * * *

B. *Legislative History.*

Section 710(c) of the 1939 Code is a special relief provision designed to give relief in hardship cases by leveling the burden of excess profits taxes over a period not to exceed five consecutive tax years of a going concern. The Excess Profits Tax Amendments of 1941, c. 10, 55 Stat. 17, added special relief provisions to the Excess Profits Act as originally enacted in 1940, allowing corporations to carry forward any unused excess profits credit into the two succeeding taxable years. In describing these special relief provisions and the carry forward, Congress said (S. Rep. No. 75, 77th Cong., 1st Sess., p. 2 (1941-1 Cum. Bull. 564, 565); H. Rep. No. 146, 77th Cong., 1st Sess., pp. 1-2 (1941-1 Cum. Bull. 550-551)):

> Experience with excess-profits taxes, both in the United States and abroad, has demonstrated conclusively that relief in abnormal cases can not be predicated on specific instances foreseeable at any time. The unusual cases that are certain to arise are so diverse in character and unpredictable that relief provisions couched in other than general and flexible terms are certain to prove inadequate.
>
> For these reasons, the present legislation at-

> tempts to provide, both by specific terms and in carefully guarded general terms, a set of flexible rules which should alleviate at least the bulk of the *severe hardship cases* which may arise. * * *
>
> * * * * *
>
> The bill affords relief in the following situations:
>
> 1. It relieves the *hardships* which may be *caused by the sharply fluctuating earnings* of many types of companies, the activities of which are *dependent upon business cycles,* by allowing unused excess-profits credits to be carried over into the two succeeding taxable years, thereby tending *to level off the unusual effects due to rise and fall of income.* * * * [Italics supplied.]

The Revenue Act of 1942, c. 619, 56 Stat. 798, added amendments to permit corporations also to carry this unused credit back two years. The expressed purpose of Congress in enacting the carry back provisions here involved (Section 710(c)(3)(A)) was to afford relief to corporations faced with the difficulties attendant upon conversion to peacetime production. That the provisions were intended to be limited to corporations which were continuing their normal business activity is demonstrated by S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 51-52 (1942-2 Cum. Bull. 504, 547), which reads in part as follows:

> Many corporations *will suffer substantially* in periods of declining profits, especially at the close of a war economy in which their deductible expenses have been held down to a bare minimum by priori-

ties, rationing, labor shortages, and other factors beyond the control of the taxpayer. * * *

* * * * *

To afford relief to these *hardship cases,* where maintenance and upkeep expenses, must, because of wartime restrictions be *deferred to peacetime years,* your committee has provided a 2-year carry-back of operating losses and of unused excess-profits credit. This provision affords, in effect, the same type of relief in periods of declining profits which the present 2-year carry-forward of operating losses and unused excess-profits credits affords in periods of increasing profits. [Italics supplied.]

It appears that the obvious purpose and intent of Congress in enacting provisions for the carry back of excess profits tax credit was to give relief to corporations faced with the difficulties attendant upon the projection of their normal business activities into the ensuing peacetime era and that Congress did not intend the excess profits tax credit carry back provisions to benefit a corporation which had ceased business and whose continued existence served no business purpose.

Congress recognized the dangers involved in the carry back provisions and sought to warn against the very situation involved in this case. Congress observed, in connection with the 1945 Revenue Act, c. 453, 59 Stat. 556, which repealed the excess profits tax but provided for carry backs of unused excess profits tax credits from 1946 in certain circumstances, that (S. Rep. No. 655, 79th Cong., 1st Sess., p. 30 (1945 Cum. Bull. 621, 645)):

There is danger that the operation of the unused excess-profits credit carry-back provision, particu-

larly in 1946, may make possible certain *abuses.* These potential abuses might arise through various devices or transactions entered into wholly or in large part for the purpose of obtaining refunds of wartime excess-profits taxes through unused credit carry-backs, or through transactions having the apparent effect of creating carry-back refunds in *situations unrelated to the purpose and intent of the provisions allowing carry-backs.* While various *tax-avoidance schemes* are already dealt with either by express provision in the internal-revenue laws or *through court decisions,* your committee will give further consideration to the necessity or desirability of retroactive legislation in this connection. [Italics supplied.]

C. *The Tax Court correctly held that the taxpayer is not entitled to a carry back from the fiscal years 1945 and 1946 inasmuch as it had been* de facto *dissolved as of November 1, 1944.*

It is well established that whether or not a taxpayer corporation is entitled to relief under the carry back provisions of Section 710(c)(3) of the Code must depend upon whether the facts presented show that the conditions against which Congress sought to relieve actually obtained with respect to it. *Wier Long Leaf Lumber Co.* v. *Commissioner,* 173 F. 2d 549 (C.A. 5th); *Eastern Grain Elevator Corp.* v. *McGowan,* 95 F. Supp. 40 (W.D. N.Y.); *Justice Motor Corp.* v. *McGowan,* 97 F. Supp. 570 (W.D. N.Y.).

Taxpayer admits that if a corporation has legally been dissolved there would be no excess profits credit thereafter subject to a carry back. (Br. 13.) Taxpayer

argues that the language of Section 710(c) and of Treasury Regulations 112, Section 35.710-3 (Appendix, *infra*), does not exclude corporations in liquidation from the benefits of an unused excess profits credit carry-back. (Br. 8.) The Tax Court, however, made no holding and the Commissioner has never maintained that simply because a corporation has begun to liquidate it is no longer entitled to a carry back.

The principle that is involved here is one which has frequently been decided,—that a corporation that is in existence in name only without corporate substance and which serves no business purpose must be treated as *de facto* dissolved and a carry back denied. *Wier Long Leaf Lumber Co.* v. *Commissioner, supra; Aluminum Products Co.* v. *United States*, 101 F. Supp. 373 (C. Cls.); *Eastern Grain Elevator Corp.* v. *McGowan, supra; Wheeler Insulated Wire Co.* v. *Commissioner,* 22 T. C. 380; *Diamond A Cattle Co.* v. *Commissioner,* 21 T. C. 1; *Winter & Co. (Indiana)* v. *Commissioner,* 13 T. C. 108; *Gorman Lumber Sales Co.* v. *Commissioner,* 12 T. C. 1184; *Rite-Way Products, Inc.* v. *Commissioner,* 12 T. C. 475.

As stated in *Gregory* v. *Helvering,* 293 U. S. 465, 469, where the Supreme Court held the creation of a corporation was "simply an operation having no business or corporate purpose" under the circumstances of the case, "the question for determination is whether what was done, apart from the tax motive, was the thing which the statute intended". It has been repeatedly held under various provisions of the revenue laws that a corporation remains a separate taxable entity only so long as it serves a business purpose. *Gregory* v. *Helvering, supra; Burnet* v. *Commonwealth Imp. Co.,* 287 U. S.

415; *Moline Properties* v. *Commissioner,* 319 U. S. 436. A thorough analysis of the proposition may be found in *National Investors Corp.* v. *Hoey,* 144 F. 2d 466 (C. A. 2d), where the Court of Appeals, after reviewing Supreme Court authorities, stated (p. 468):

> to be a separate jural person for purposes of taxation, a corporation must engage in some industrial, commercial, or other activity besides avoiding taxation: in other words, that the term "corporation" will be interpreted to mean a corporation which does some "business" in the ordinary meaning; and that escaping taxation is not "business" in the ordinary meaning.

The facts of the *National Investors Corp.* case are of interest here. In that case the corporate taxpayer had created a new corporation and had transferred to it all of the assets of the taxpayer's subsidiaries in return for stock in the new corporation. When the stockholders rejected the plan of unification in 1934, the taxpayer decided to liquidate the corporation, and commenced the liquidation on December 21, 1935. Liquidation was not completed until 1936. The court stated (p. 468):

> However, although the stipulation declares that the "Plan" was submitted to the shareholders on December 20, 1934, and was rejected, it does not tell us when the rejection took place, or why the plaintiff waited for almost the whole year 1935 before liquidating the company. * * *
>
> The reason upon this record why we cannot accept the value on that day is that, although the original acquisition of the shares was a part of a "business" activity, as well as their subsequent retention until

> the "Plan" was rejected, as soon as that happened, *any continued retention of the securities longer than was necessary for liquidation, was not a "business" activity,* * * *. [Italics supplied.]

Nor is it of any significance that the Tax Court did not expressly find that taxpayer's motive in prolonging the liquidation was to avoid taxes. In *Commissioner* v. *National Carbide Corp.,* 167 F. 2d 304 (C. A. 2d), affirmed, 336 U. S. 442, the court stated (p. 306):

> We think that the citation of *Gregory* v. *Helvering,* as authority for this, meant that the subsidiary was a "sham" when it was not created or used for some business purpose, * * *
>
> * * * for it is not the presence of an accompanying motive to escape taxation that is ever decisive, but the absence of any motive which brings the corporation within the group of those enterprises which the word ordinarily includes.

See also *Gregory* v. *Helvering, supra.*

The record in this case makes clear that taxpayer did not continue its normal business activity during the fiscal years 1945 and 1946. Taxpayer does not deny that on March 7, 1944, all taxpayer's stockholders joined in a resolution consenting to the dissolution and that after April 1, 1944, taxpayer ceased to carry on a brewery business. The Tax Court allowed a carry back up to the end of October, 1944, but held that taxpayer had *de facto* dissolved on November 1, 1944. After that date and during the fiscal years 1945 and 1946, taxpayer had no sales and therefore received no profit from sales. It had no inventory. It likewise had no land, plant or

equipment. All had been taken over by the partnership when distribution in liquidation was made of nearly all the taxpayer's assets. (R. 79; see footnote 4, *supra.*) Taxpayer paid no salaries or wages after November 1, 1944. Its assets were reduced from $1,540,321.67 on March 31, 1944, to $14,670.34 at the end of the fiscal year 1945. After November 1, 1944, it had no accounts receivable. Its only income was derived from interest on United States Treasury obligations, recoveries on bad debts, and a refund of California franchise tax. The letter addressed to taxpayer's auditor from its attorney dated January 4, 1946, makes clear that the only reason excess profits tax returns were filed for the fiscal year 1945 was to show a basis for claiming an alleged unused excess profits credit carry-back. (R. 73-74.)

Moreover, under the California statutes, once the voluntary resolution to dissolve is passed by a corporation's stockholders it is thereafter prohibited from further engaging in business except for matters incident to winding up and the date of passing the resolution is considered the time at which proceedings for winding up commence. (California Corporations Code, Secs. 4600, 4604, 4605, Appendix *infra.*) Sections 5200 and 5201 of the California Corporations Code (Appendix, *infra*) requiring that a certificate of winding up and dissolution be filed contemplate the continuance of corporate existence "for the purpose of further winding up if needed", and by Section 5400 of the California Corporations Code (Appendix *infra*) the dissolved corporation

> nevertheless continues to exist for the purpose of winding up its affairs, prosecuting and defending actions by or against it, and enabling it to collect

> and discharge obligations, dispose of and convey its property, and collect and divide its assets, but not for the purpose of continuing business except so far as necessary for the winding up thereof.

Actions or proceedings to which the dissolved corporation is a party do not abate by dissolution. (California Corporations Code, Sec. 5401, Appendix, *infra.*) There is thus no merit to taxpayer's contention that it could not dissolve until tax controversies had been settled. (Br. 15.)

The only argument advanced by the taxpayer to show that it had not *de facto* dissolved on November 1, 1944, is that controversies existed with the Internal Revenue Service with respect to excess profits taxes and that it necessarily had to file various tax returns and claims after November 1, 1944. It should be mentioned that the taxpayer has not always contended that it had continued in existence after that date. See *Gordon* v. *Aztec Brewing Co.,* 33 Cal. 2d 514, 203 P. 2d 522.

In the instant case the Tax Court was more than fair in allowing the taxpayer the benefits of a carry back during a seven months' period after it ceased to operate its business in which it could have easily completed all normal corporate activities incident to winding up. The same individuals were continuing to carry on an identical business under another form which was not subject to excess profits taxes, and no reason for dissolution appears in the record other than tax avoidance. The preparation of tax returns and claims under Section 722 could easily have been done after final dissolution. It should be noted that some of these returns were admittedly unnecessary (R. 74), and that the Section

722 claims have been denied.[6] The record does not disclose any reason for prolonging taxpayer's existence without surrendering its charter other than the hope of further tax benefits. There is nothing in the record to warrant a finding that taxpayer retained its existence and substance as well as form. To permit the taxpayer here to continue to carry back a large excess profits credit simply by retaining its charter and doing nothing is totally contrary to the purpose of Congress in enacting Section 710(c).

In the case of *Wier Long Leaf Lumber Co.* v. *Commissioner, supra,* the facts involved were very similar to the facts in the instant case. In that case, on December 19, 1943, the directors and stockholders adopted a resolution to proceed promptly and in due order to accomplish the dissolution of Wier Long Leaf Lumber Company. By the end of 1942, the principal operating assets had been disposed of and a large distribution in liquidation had been made to the stockholders. Although the operating assets had been substantially disposed of in 1942, liquidation had not been formally completed at the time of the hearing before the Tax Court in May, 1946. On its 1943 and 1944 returns the taxpayer stated its business as "in liquidation." In that case (as in the instant case) the taxpayer introduced no evidence to explain why the liquidation had been prolonged despite the fact that the operating assets had been disposed of and business operations had in effect ceased in 1942. No reason was offered why the cash on hand in 1943 and 1944 had not been distributed to the stockholders.

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[6] The portion of the Tax Court's opinion dealing with the disallowance of the Section 722 claims forms part of the record in this case but is not included in the printed record.

The Wier Long Leaf Lumber Company took the same position as the taxpayer in the instant case is taking and contended that it should be allowed to carry back for each of the liquidation years 1943 and 1944 an amount which would eliminate all the taxes it had paid, because the excess profits tax credit is computed on the basis of average income for a period of years of normal business activity. The Court of Appeals for the Fifth Circuit held that taxpayer was entitled to an excess profits credit carry back from 1943 but not from 1944. In sustaining the Commissioner's position as to 1944 the court said (pp. 551, 553):

> * * * the fact of liquidation and the particular circumstances and stages of it are relevant to the inquiry here, and * * * they may, indeed must, be inquired into.
>
> * * * if it appears that the corporation is a corporation in name only, without corporate substance and serving no real corporate purpose, it must, though not formally dissolved, be treated as dissolved *de facto*.
>
> * * * * *
>
> * * * as to the year 1944 * * * the liquidation had by the year's end progressed to the point where there was no longer any valid reason for delaying dissolution, and the corporation, though not dissolved *de jure*, must be regarded, for the purpose of its claim to excess profits carry back for 1944 as *de facto* dissolved.

The court's holding in the *Wier Long Leaf Lumber Co.* case, *supra*, that the taxpayer there was entitled to

a carry back during the first year after it had commenced the liquidation of its operating assets, but not during the second year thereafter, fully supports the Commissioner's position here that the taxpayer was entitled to the carry back in neither the first nor the second year after this taxpayer had fully liquidated its operating assets. In the *Wier Long Leaf Lumber Co.* case, *supra,* taxpayer entered the year 1943, in which it was held to be entitled to a carry back, with assets worth nearly a million dollars. These assets included more than $100,000 of accounts receivable, which were directly attributable, of course, to the operation of its regular business, and its assets were subject to liabilities of more than half a million dollars, also attributable to its regular business. It had only just begun its liquidation. On the other hand, the Wier Long Leaf Lumber Company entered 1944, the year in which it was held not entitled to a carry back, with approximately $140,000 worth of assets and $8,000 worth of liabilities and the court concluded that, since the corporation was without substance and served no real corporate purpose, it must, though not formally dissolved, be treated as dissolved *de facto.* The court called attention to the Texas statute which provides that a corporation is continued for three years after dissolution for the purpose of enabling those charged with the duty to settle up its affairs.

In *Aluminum Products Co.* v. *United States, supra,* the Court of Claims in denying a carry back to a personal holding company stated (p. 376):

> We think that the mere fact that in a statute relating to excess profits credits there is a reference to domestic corporations, does not show a statutory intention to allow every domestic corporation,

> whatever its nature and taxable status, to have an excess profits credit.

In the *Eastern Grain Elevator Corp.* case, *supra,* the District Court held that where a corporation's liquidation had progressed to the point where it was ended except for certain matters that could have been arranged to be included in a plan of liquidation, a liquidation period of only six months was allowable during which the corporation was entitled to benefits of unused excess profits credits for a carry back. In that case the certificate of dissolution was filed December 28, 1944, and the court pointed out that by June 28, 1945, all the matters then pending could have been adjusted during the six months' period. There remained open (1) the right of the corporation to a postwar refund and carry back credit under the tax adjustment bill of 1945 which had not yet become effective; (2) setting up a fund of stockholders against liability of unknown claimants; and (3) the declaration of a final dividend. The court, however, allowed no carry back after June 28, 1945.

The case of *Wheeler Insulated Wire Co.* v. *Commissioner,* 22 T. C. 380, also involved a situation comparable to that in the instant case. A Connecticut corporation, which doubtless would have prospered had it gone on conducting its business during the war years of 1944 and 1945, voluntarily transferred its business and assets to an affiliated corporation leaving taxpayer with no business, no substantial income, and no excess profits net income. The Tax Court said (p. 384):

> Congress had no reason or intention to allow a corporation thus denuded of its business and business assets to carry back unused excess profits

> credits to earlier years, during which it had excess profits net income from its business, while that business continued to earn excess profits net income in the hands of a related corporation. Section 710(c) should not be interpreted to give relief where the conditions and the reasons for relief which Congress had in mind do not exist. *Diamond A Cattle Co., supra,* and cases there cited.

Again, in *Diamond A Cattle Co.* v. *Commissioner,* 21 T. C. 1, a taxpayer was operating successfully in 1945 with prospects of profits in the future when it voluntarily dissolved, thus preventing itself from making further sales. Its assets were transferred to the sole stockholder in liquidation. The Tax Court held that there was no justification for allowing a carry back since Congress intended the credit to be carried back only in cases where it was not needed in the tax year to offset normal earnings. It held that where the 1945 earnings were not normally low but were reduced merely by taxpayer's voluntary liquidation before the normal earning cycle was completed, there was no reason for applying the special relief provisions. As in this case there was no hardship.

In *Winter & Co. (Indiana)* v. *Commissioner,* 13 T. C. 108, the taxpayer had discontinued its business operations during the five-year cycle and had no earnings or expenses as an operating company for the year in which it claimed unused excess profits credit. The Tax Court said (p. 117):

> If a corporation to which the provision for such credit is applicable should discontinue its operating functions after the lapse of a month, a year, or

> two years, within such applicable period, we think it inconceivable that Congress intended that the excess profits credit was to apply not only to the operating years, but also to each of the remaining nonoperating years of the maximum authorized cycle. *For if there is no production there can be no excess profits income, potential or actual, and, hence, no occasion for the authorization of an excess profits credit. It follows that if, under the situation stated, no excess profits credit is allowable, there could be no excess profits credit to carry back.* [Italics supplied.]

Since the issue here is essentially one of fact, other decisions seemingly *contra* are all distinguishable on their facts. The case of *Mesaba-Cliffs Min. Co.* v. *Commissioner,* 174 F. 2d 857 (C. A. 6th), on which taxpayer relies (Br. 21, 32) was distinguished in the *Eastern Grain Elevator Corp.* and *Winter & Co.* cases, *supra.* In the *Mesaba* case, there was no liquidation and the taxpayer continued to function as a corporation and to make sales of iron ore during the year from which a carry back was allowed. Again, in *Whitney Mfg. Co.* v. *Commissioner,* 14 T. C. 1217 (Br. 24, 26, 32), the Tax Court found that the corporation had remained as a going business without taking any steps to liquidate, the sale of part of its assets being for the purpose of securing money to pay debts. The taxpayer also continued to operate its business in the years from which a carry back was allowed in *Coca-Cola Bottling Co. of Sacramento, Ltd.* v. *Commissioner,* 19 T. C. 282, supplementing 17 T. C. 101, affirmed on other grounds, *sub nom. Sellers* v. *Commissioner* (C. A. 9th), January 4, 1955.

The cases are likewise distinguishable on their facts allowing a carry back from the year in which a corporation engaged in nominal liquidation of remaining assets after having disposed of all operating assets at arm's length. *Craig, Trustee for Craig Furniture Co.* v. *Squire* (W. D. Wash.), decided March 2, 1954 (1954 P-H, par. 72,444); *Brainard* v. *Scofield* (W. D. Tex.), decided December 15, 1953 (1953 P-H, par. 72,835); *Myers, Trustee for Monticello Cotton Mills* v. *United States* (E. D. Ark.), decided January 5, 1952 (1952 P-H, par. 72,338); *Westover* v. *Smyth,* 99 F. Supp. 488 (N. D. Cal.); *Jos. Capps, Inc.* v. *United States,* 86 F. Supp. 712 (S. D. Cal.); *Bowman* v. *Glenn,* 84 F. Supp. 200 (N. D. Ky.), affirmed *per curiam,* 184 F. 2d 670 (C. A. 6th).

The cases relied on by the taxpayer (Br. 26, 28) dealing with annualization of income are not in point here. *United States* v. *Kingman,* 170 F. 2d 408 (C. A. 5th); and *Roeser & Pendleton, Inc.* v. *Commissioner,* 15 T. C. 966, affirmed on other grounds, *sub nom. M-B-K Drilling Co.* v. *Commissioner,* 194 F. 2d 221 (C. A. 10th).

The allowance of a carry back deduction, like other deductions, is a matter of legislative grace and the burden rests on the taxpayer to show his right to the deduction. *Interstate Transit Lines* v. *Commissioner,* 319 U. S. 590, rehearing denied, 320 U. S. 809. This the taxpayer has failed to do. In the absence of a showing that the Tax Court was clearly erroneous in its finding that the taxpayer had *de facto* dissolved, on which the denial of a carry back depends, its decision should be affirmed. *United States* v. *Real Estate Boards,* 339 U. S. 485; *United States* v. *Gypsum Co.,* 333 U. S. 364, rehearing denied, 333 U. S. 869.

CONCLUSION

The decision of the Tax Court is correct and should be affirmed.

Respectfully submitted,

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JANUARY, 1955.

APPENDIX

Internal Revenue Code of 1939:

SEC. 710 [As added by Sec. 201, Second Revenue Act of 1940, c. 757, 54 Stat. 974]. IMPOSITION OF TAX.

(a) [As amended by Sec. 201(a), Revenue Act of 1941, c. 412, 55 Stat. 687, and Sec. 202, Revenue Act of 1942, c. 619, 56 Stat. 798] *Imposition.*—

(1) *General Rule.*—There shall be levied, collected, and paid for each taxable year, upon the adjusted excess-profits net income, as defined in subsection (b), of every corporation (except a corporation exempt under section 727) a tax equal to whichever of the following amounts is the lesser:

(A) 90 per centum of the adjusted excess-profits net income, or

(B) an amount which when added to the tax imposed for the taxable year under Chapter 1 (other than section 102) equals 80 per centum of the corporation surtax net income, computed under section 15 or Supplement G, as the case may be, but without regard to the credit provided in section 26(e) (relating to income subject to the tax imposed by this subchapter).

* * * * *

(b) *Definition of Adjusted Excess Profits Net Income.*—As used in this section, the term "adjusted excess profits net income" in the case of any taxable year means the excess profits net income (as defined in section 711) minus the sum of:

(1) [As amended by Sec. 205 (g), Revenue Act of 1942, *supra*] *Specific Exemption.*—A specific exemption of $5,000, and in the case of a mutual insurance company (other than life or marine) which is an interinsurer or reciprocal underwriter a specific exemption of $50,000;

(2) *Excess Profits Credit.*—The amount of the excess profits credit allowed under Section 712; and

(3) [As amended by Sec. 2(a), Excess Profits Tax Amendments of 1941, c. 10, 55 Stat. 17, and Sec. 204(a), Revenue Act of 1942, *supra*] *Unused Excess Profits Credit.*—The amount of the unused excess profits credit adjustment for the taxable year computed in accordance with subsection (c).

(c) [As added by Sec. 2(b), Excess Profits Tax Amendments of 1941, *supra,* and amended by Sec. 204(b), Revenue Act of 1942, *supra*] *Unused Excess Profits Credit Adjustment.*—

(1) *Computation of unused excess profits credit adjustment.*—The unused excess profits credit adjustment for any taxable year shall be the aggregate of the unused excess profits credit carry-overs and unused excess profits credit carry-backs to such taxable year.

(2) *Definition of unused excess profits credit.*—The term "unused excess profits credit" means the excess, if any, of the excess profits credit for any taxable year beginning after December 31, 1939, over the excess profits net income for such taxable year, computed on the basis of the excess profits credit applicable to such taxable year. For such purpose the excess profits credit and the excess profits net income for any taxable year be-

ginning in 1940 shall be computed under the law applicable to taxable years beginning in 1941. The unused excess profits credit for a taxable year of less than twelve months shall be an amount which is such part of the unused excess profits credit determined under the first sentence of this paragraph as the number of days in the taxable year is of the number of days in the twelve months ending with the close of the taxable year.

(3) *Amount of unused excess profits credit carry-back and carry-over.*—

(A) *Unused Excess Profits Credit Carry-Back.*—If for any taxable year beginning after December 31, 1941, the taxpayer has an unused excess profits credit, such unused excess profits credit shall be an unused excess profits credit carry-back for each of the two preceding taxable years, except that the carry-back in the case of the first preceding taxable year shall be the excess, if any, of the amount of such unused excess profits credit over the adjusted excess profits net income for the second preceding taxable year computed for such taxable year (i) by determining the unused excess profits credit adjustment without regard to such unused excess profits credit, and (ii) without the deduction of the specific exemption provided in subsection (b)(1).

(B) *Unused Excess Profits Credit Carry-Over.*— * * *

* * * * *

(26 U. S. C. 1952 ed., Sec. 710.)

SEC. 712 [As added by Sec. 201, Second Revenue Act of 1940, *supra,* and amended by Sec. 13, Excess Profits Tax Amendments of 1941, *supra.*] EXCESS PROFITS CREDIT—ALLOWANCE.

(a) *Domestic Corporations.*—In the case of a domestic corporation which was in existence before January 1, 1940, the excess profits credit for any taxable year shall be an amount computed under section 713 or section 714, whichever amount results in the lesser tax under this subchapter for the taxable year for which the tax under this subchapter is being computed. In the case of all other domestic corporations the excess profits credit for any taxable year shall be an amount computed under section 714. (For allowance of excess profits credit in case of certain reorganizations of corporations, see section 741.)

* * * * *

(26 U. S. C. 1952 ed., Sec. 712.)

SEC. 713 [As added by Sec. 201, Second Revenue Act of 1940, *supra,* and amended by Sec. 4(a), Excess Profits Tax Amendments of 1941, *supra,* and Sec. 228(e)(2), Revenue Act of 1942, *supra*]. EXCESS PROFITS CREDIT—BASED ON INCOME.

(a) *Amount of Excess Profits Credit.*—The excess profits credit for any taxable year, computed under this section, shall be—

(1) *Domestic corporations.*—In the case of a domestic corporation—

(A) 95 per centum of the average base period net income,

(B) Plus 8 per centum of the net capital addition as defined in subsection (g), or

(C) Minus 6 per centum of the net capital reduction as defined in subsection (g).

* * * * *

(26 U. S. C. 1952 ed., Sec. 713.)

Revenue Act of 1945, c. 453, 59 Stat. 556:

SEC. 122. REPEAL OF EXCESS PROFITS TAX IN 1946.

(a) *In General.*—The provisions of subchapter E of chapter 2 shall not apply to any taxable year beginning after December 31, 1945.

(b) *Carry-Backs from Years After 1945, Etc.*—Despite the provisions of subsection (a) of this section the provisions of subchapter E of chapter 2 shall remain in force for the purposes of the determination of the taxes imposed by such subchapter for taxable years beginning before January 1, 1946, such determination to be made as if subsection (a) had not been enacted but with the application of the amendments made by subsection (c) of this section and section 131 of this Act.

* * * * *

Treasury Regulations 112, promulgated under the Internal Revenue Code:

Sec. 35.710-1 *Scope of Tax.*—The excess profits tax is imposed upon the adjusted excess profits net income of every corporation, both domestic and foreign, for each income-tax taxable year beginning after December 31, 1939, except certain corporations which are exempt. * * *

Sec. 35.710-2 *Measure of Tax.*—The adjusted excess profits net income upon which is based the excess profits tax for a taxable year is determined by deducting from the excess profits net income (determined under the provisions of section 711 applicable to such year) the sum of:

* * * * *

Sec. 35.710-3. *Unused Excess Profits Credit Adjustment.*—(a) *Unused excess profits credit.*—The unused excess profits credit for any taxable year beginning after December 31, 1939, is the excess of the excess profits credit for the taxable year over the excess profits net income, if any, for such taxable year. * * *

* * * * *

(b) *Unused excess profits credit adjustments.*—The unused excess profits credit adjustment is the aggregate of the portions of the unused excess profits credits for the two preceding and two succeeding taxable years which are treated under section 710 (c)(3) as unused excess profits credit carry-overs and unused excess profits credit carry-backs to the taxable year. Under the provisions of section 710(c)(3) the unused excess profits credit for any taxable year beginning on or after January 1, 1942, is carried back to each of the two preceding taxable years (not considering as a preceding taxable year any taxable year beginning before January 1, 1941) and forms part of the unused excess profits credit adjustment for such preceding taxable year. The unused excess profits credit for any taxable year beginning after December 31,

1939, to the extent it is not used as a carry-back, is carried forward to the two succeeding taxable years and forms part of the unused excess profits credit adjustment for such of those succeeding taxable years as begin after December 31, 1940. The amount which is carried back or carried forward is limited in the case of each such preceding or succeeding taxable year to the portion of the unused excess profits credit which was not applied against excess profits net income (either as part of the excess profits credit carry-over in the case of a taxable year beginning in 1940 or as part of the unused excess profits credit adjustment in the case of a taxable year beginning after December 31, 1940) in determining the adjusted excess profits net income for the taxable years, if any, before such preceding or succeeding taxable year. The amount of the unused excess profits credit which was so applied is determined as follows: The adjusted excess profits net income is computed for each such taxable year without the specific exemption of $5,000 allowed by section 710(b)(1), and without credit of any carry-over or carry-back from the taxable year in which such unused excess profits credit arose or from any taxable year subsequent thereto. The unused excess profits credit, which is a carry-over or a carry-back to such taxable year, is considered to have been applied against the amount so computed.

The entire unused excess profits credit for any taxable year beginning after December 31, 1939, but not beginning after December 31, 1941, is carried over to the first succeeding taxable year. The

unused excess profits credit is carried over to the second succeeding taxable year to the extent it exceeds the adjusted excess profits net income for the first succeeding taxable year. For the purpose of determining this excess, the adjusted excess profits net income is computed without credit of the specific exemption of $5,000 allowed by section 710(b)(1) and without credit of the carry-over from the taxable year in which the unused excess profits credit arose or of any carry-over or carry-back from a taxable year subsequent thereto. The entire unused excess profits credit for any taxable year beginning after December 31, 1941, is carried back to the second preceding taxable year if such taxable year began after December 31, 1940. If the second preceding taxable year began prior to January 1, 1941, the entire unused excess profits credit is carried back to the first preceding taxable year, since a taxable year beginning prior to January 1, 1941, is not considered a "preceding taxable year" for the purposes of section 710(c)(3), and no part of the adjusted excess profits net income for such a taxable year reduces the amount of the unused excess profits credit for a taxable year beginning after December 31, 1941, which may be carried back or carried over to other taxable years. If the second preceding taxable year began after December 31, 1940, the unused excess profits credit is carried back to the first preceding taxable year to the extent it exceeds the adjusted excess profits net income for the second preceding taxable year, such adjusted excess profits net income being computed without credit of the specific exemption of $5,000

and without credit of any carry-back from the taxable year in which the unused excess profits credit arose. The unused excess profits credit is carried over to the first succeeding taxable year to the extent that it exceeds the aggregate of the adjusted excess profits net incomes for the two preceding taxable years (computed for each such taxable year without credit of the specific exemption of $5,000 and without credit of any carry-back from the taxable year in which such unused excess profits credit arose or of any carry-back from a taxable year subsequent thereto), not considering as a preceding taxable year any taxable year beginning prior to January 1, 1941. The unused excess profits credit is carried over to the second succeeding taxable year to the extent that the unused excess profits credit exceeds the aggregate of the adjusted excess profits net income for the two preceding taxable years and for the first succeeding taxable year (computed for each such taxable year without credit of the specific exemption of $5,000 and without credit of any carry-over or carry-back from the taxable year in which the unused excess profits credit arose or from any taxable year subsequent thereto), not considering as a preceding taxable year any taxable year beginning prior to January 1, 1941.

* * * * *

Deering's California Corporations Code, Annotated (1947 ed.):

Sec. 4600. *Election by vote or consent of shareholders or members.* Any corporation may elect to

wind up its affairs and voluntarily dissolve by the vote or written consent of shareholders or members representing 50 percent or more of the voting power.

Sec. 4604. *When proceedings deemed to commence.* Voluntary proceedings for winding up the corporation are deemed to commence upon the adoption of the resolution of shareholders or directors of the corporation electing to wind up and dissolve, or upon the filing with the corporation of the written consent of shareholders thereto. However, if such proceedings are instituted because of the expiration of the term of corporate existence or other dissolution of the corporation, the proceedings for winding up are deemed to commence at the date of termination of its corporate existence.

Sec. 4605. *Cessation of business on commencement of proceeding: Notice of commencement.* When a voluntary proceeding for winding up has commenced, the corporation shall cease to carry on business except to the extent necessary for the beneficial winding up thereof. The directors forthwith shall cause written notice of the commencement of the proceeding for voluntary winding up to be given by mail to all shareholders and to all known creditors and claimants whose addresses appear on the records of the corporation.

Sec. 4800. *Directors to act as board in voluntary proceedings: Election of officers: Acts authorized by majority of directors as binding.* * * *

Sec. 4801. *Same: Powers and duties of directors.* The powers and duties of the directors after commencement of such proceedings include, but are

not limited to, the following acts in the name and on behalf of the corporation:

(a) To elect officers and to employ agents and attorneys to liquidate or wind up its affairs.

(b) To continue the conduct of the business insofar as necessary for the disposal or winding up thereof.

(c) To carry out contracts and collect, pay, compromise, and settle debts and claims for or against the corporation.

(d) To defend suits brought against the corporation.

(e) To sue, in the name of the corporation, for all sums due or owing to the corporation or to recover any of its property.

(f) To collect any amounts remaining unpaid on subscriptions to shares or any overpayments or unlawful distributions.

(g) To sell at public or private sale, exchange, convey, or otherwise dispose of, all or any part of the assets of the corporation, upon such terms and conditions and for such considerations as such board deems reasonable or expedient, and to execute bills of sale and deeds of conveyance in the name of the corporation. If sale or exchange of all or substantially all of the assets of a corporation for profit is made for a consideration consisting in whole or in part of shares, obligations, or securities of another corporation, domestic or foreign, or any consideration other than money, it shall be approved or ratified by the vote or written consent of holders of shares entitled to exercise a majority of

the voting power of the corporation, either before or after the action of the directors.

(h) In general, to make contracts and to do any and all things in the name of the corporation which may be proper or convenient for the purposes of winding up, settling, and liquidating the affairs of the corporation.

Sec. 5200. *Certificate of winding up and dissolution.* When a corporation has been completely wound up without court proceedings therefor, a majority of the board of directors or trustees shall sign a certificate of winding up and dissolution which shall be verified by their affidavit stating, in effect, that the matters set forth in the certificate are true of their own knowledge. The certificate shall state:

(a) That the corporation has been completely wound up.

(b) Whether its known debts and liabilities have been actually paid, or adequately provided for, or paid as far as its assets permitted, or that it has incurred no known debts or liabilities, as the case may be. If there are known debts and liabilities for payment of which adequate provision has been made, the certificate shall state what provision has been made, setting forth the name and address of the corporation, person, or governmental agency that has assumed or guaranteed the payment, or the name and address of the depositary with which deposit has been made, or such other information as may be necessary to enable the creditor or other person to whom payment is to be made to appear and claim payment of the debt or liability.

(c) Whether its known assets have been distributed to shareholders or members, or wholly applied on account of its debts and liabilities, or that it acquired no known assets, as the case may be.

Sec. 5201. *Same: Filings with Secretary of State and county clerk: Prerequisite showing of satisfaction of taxes.* The certificate of winding up and dissolution shall be filed in the office of the Secretary of State, and thereupon corporate existence shall cease except for the purpose of further winding up if needed. However, before any corporation taxed under the Bank and Corporation Franchise Tax Law may file a certificate of winding up and dissolution it shall file or cause to be filed with the Secretary of State the certificate of satisfaction of the Franchise Tax Commissioner that all taxes imposed under the Bank and Corporation Franchise Tax Law have been paid or secured.

A copy of the certificate of winding up and dissolution, certified by the Secretary of State, shall be filed in the office of the county clerk of the county in which the principal office of the corporation is located.

Sec. 5400. *Continued existence of dissolved corporations: Purposes for continued existence.* A corporation which is dissolved by the expiration of its term of existence, by forfeiture of existence by order of court, or otherwise, nevertheless continues to exist for the purpose of winding up its affairs, prosecuting and defending actions by or against it, and enabling it to collect and discharge obligations, dispose of and convey its property, and collect and

divide its assets, but not for the purpose of continuing business except so far as necessary for the winding up thereof.

Sec. 5401. *Abatement of actions.* No action or proceeding to which a corporation is a party abates by the dissolution of the corporation or by reason or proceedings for dissolution and winding up thereof.

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